No. 942

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

RUTH ETTA WITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (III R. 3-7;[1] Pet. App. "A", pp. 1-7) is reported at 287 F. 2d 389.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961 (III R. 8). A petition for

[1] "R." refers to the three volumes of the transcript of record in the courts below on file in this Court, and will be designated by the appropriate volume number.

rehearing was denied on April 3, 1961 (III R. 91). The petition for a writ of certiorari was filed on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, upon entry into the United States, was lawfully searched by a customs inspectress, and whether narcotics found on her person were lawfully seized.

2. Whether 21 U.S.C. 174 is constitutional in permitting a presumption arising from possession.

STATUTES INVOLVED

19 U.S.C. 482, 14 Stat. 178, provides in pertinent part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law * * *; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, * * * he shall seize and secure the same for trial.

19 U.S.C. 1582, 46 Stat. 748, provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

21 U.S.C. 174, 70 Stat. 570, provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned not less than five or more than twenty years * * *.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * *

STATEMENT

Petitioner was convicted (II R. 178-180) in the District Court for the Southern District of California on one count of an indictment charging willful trans-

portation of narcotics into the United States, in violation of 21 U.S.C. 174 (I R. 2; see II R. 164). She was sentenced to five years' imprisonment (II R. 197; see I R. 27-30). On appeal, the conviction was unanimously affirmed (III R. 7, 8; Pet. App. "A"; p. 7). The principal issue raised is the validity of the search of petitioner's person from which the narcotics were seized.

At a pre-trial motion to suppress, it was shown that, on December 26, 1959, Customs Inspector Rudolph Dale was told to be on the lookout for a green and white 1957 Mercury hardtop automobile, with California license plates number MNJ-592, which would contain one or two colored women. At about 9:15 p.m. that same day, Inspector Dale stopped such a vehicle at the Customs House at San Ysidro, California, as it entered the United States from Mexico (II R. 35-37, 41-42). A man was driving; petitioner was seated next to him in the front seat. When the petitioner and the driver indicated that they did not have any merchandise to declare, Inspector Dale entered the car and drove it over to a customs area where it was subsequently searched (II R. 37-40).

A customs inspectress brought the petitioner into a private search room and told the petitioner that she would have to remove her clothing in order that a "personal search" could be made (II R. 41). The inspectress said that, if the petitioner did not remove her clothing, "measures" would be taken to have it removed (II R. 46). Petitioner then removed all of her clothing. The inspectress found a package of heroin inside of the petitioner's brassiere (II R. 45,

49-50).[2] The inspectress also made a search of petitioner's person. After the petitioner was dressed, she was questioned by customs officers regarding the package of narcotics. She said that she had purchased the "narcotics" in Tiajuana with money supplied to her from a man in Los Angeles named "Bo" to whom she was supposed to deliver the "narcotics", and that she was to receive $100 for her services (II R. 81-82, 90-91, 92). These admissions were denied by the petitioner at the trial (II R. 118, 125-126, 134).

ARGUMENT

1. Petitioner contends (Pet. 8-9, 11-20) that the search and seizure were unlawful because the customs officers lacked probable cause to believe that the petitioner was carrying contraband. The short answer, however, is that 19 U.S.C. 482, *supra*, p. 2, authorizes customs officials to search any person entering the United States "on * * * whom * * * they *shall suspect* there is merchandise which * * * shall have been introduced into the United States in any manner contrary to law" (emphasis added). This statute has been construed to authorize customs searches "of the broadest possible character" at the borders of the United States. *Landau* v. *United States Attorney for Southern District of New York*, 82 F. 2d 285, 286 (C.A. 2), certiorari denied, 298 U.S. 665; *United States* v. *Yee Ngee How*, 105 F. Supp. 517, 520 (N.D. Cal.); see *Carroll* v. *United States*, 267 U.S. 132, 154.

[2] At the trial, the customs inspectress testified that the petitioner was not "anxious" to remove her clothing, but that, once she had done so, she was "cooperative" (II R. 78).

Cervantes v. *United States*, 263 F. 2d 800, 803, fn. 5 (C.A. 9); *Blackford* v. *United States*, 247 F. 2d 745, 749-753 (C.A. 9), certiorari denied, 356 U.S. 914.

In the present case, the Customs Agency Service had received information that the petitioner's car would be used in introducing narcotics into the United States from Mexico, and that two colored women would probably be the occupants of the car. This information, together with a detailed description of the car, including its license tag numbers, was transmitted in the form of a "lookout bulletin" to the Customs House at San Ysidro, California, with instructions to stop (and search) such a vehicle (R. 36-37, 54-55). With this information, the customs officials, at the very least, had "suspicion" that some type of merchandise either subject to duty or illegal, such as narcotics, would be introduced into the United States by the occupants of the petitioner's car. The halting of the vehicle and the search of the petitioner were authorized, therefore, under 19 U.S.C. 482.

2. Petitioner attacks the validity of the presumption arising from "possession" under 21 U.S.C. 174, *supra*, p. 3, on the ground that it eliminates the presumption of innocence and necessity of proof beyond a reasonable doubt. The fact of possession is, however, an issue to be proved beyond a reasonable doubt subject to the presumption of innocence. See *Harris* v. *United States*, 359 U.S. 19, 23; *United States* v. *Valdes*, 229 F. 2d 145, 147 (C.A. 2), certiorari denied, 350 U.S. 996. The fact that the jury is authorized to convict a defendant unless he explains his possession of the narcotics to the satisfaction of the jury is not

unreasonable, for it is "consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." *Casey* v. *United States*, 276 U.S. 413, 418; see *Yee Hem* v. *United States*, 268 U.S. 178, 183-185.[3]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[3] The constitutionality of the provisions of 21 U.S.C. 174 here under attack has been sustained against other forms of challenge. See, *e.g.*, *Bradford* v. *United States*, 271 F. 2d 58, 60-63 (C.A. 9); *Dear Chuck Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.); *United States* v. *Mac Lisa*, 105 F. 2d 141, 146 (C.A. 2); *Coppedge* v. *United States*, 37 F. 2d 816, 818-819 (C.A. 6); *Sicla* v. *United States*, 166 F. 2d 851, 855 (C.A. 9); certiorari denied, 334 U.S. 811.